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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 369

ROBERT C. HETHERINGTON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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Your Petitioner, in the reply brief, does not propose to repeat here arguments previously advanced in the Petition. However, the Government, in its brief in opposition to the grant of certiorari, has injected new matter into the case, to some of which it is deemed desirable to make a reply.

I. In the *questions* presented to this Court by the respondent, United States of America, the following appears:

> "2. Whether the affidavit was timely filed under 28 U. S. C. 144, where no good cause was shown for failure to file it during the term of court at which the case was originally set for trial and at which pretrial motions were heard." (P. 2).

The Government may not now raise, for the first time, the question of the timeliness of petitioner's affidavit of bias and prejudice. The Government made no such contention in the District Court or in the Court of Appeals, but seeks to raise the question for the first time in its brief opposing the grant of certiorari. The short answer to the Government's contention is that it is raised too late. While the timeliness of petitioner's affidavit was never in question in either of the courts below, the Court of Appeals has made a finding heretofore unchallenged, that petitioner "made a *timely* motion accompanied by an affidavit pursuant to Section 44 of Title 28 . . ." (Pet. 1a-2a) (emphasis added).

A. No suggestion has heretofore been made that the filing of the motion was for purposes of delay as contended by respondent. (See Brief pp. 17-18.)

B. Failure to object on grounds of untimeliness concedes that under the circumstances the affidavit was timely.

II. Petitioner's affidavit of bias and prejudice was timely filed under 28 U. S. C. 144.

28 U. S. C. 144 requires that an affidavit of bias and prejudice be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." "Good cause" is not required to be shown where the affidavit was filed more "than ten days before the beginning of the term *at which the proceeding is to be heard*. . . ." (28 U. S. C. 144). This section does not refer to the term at which the case was originally set, as the United States suggests, but specifically refers to the term at which the proceedings are to be heard. The affidavit here was filed well in advance

of 10 days prior to the term of court at which the trial was scheduled to be had. This amazing contention of the government is made, notwithstanding its admitted recognition that trial would be had not earlier than the term to which we refer. (Respondent's Brief, p. 23)

The case was set for trial on September 8, 1959 (R. 3) which was the beginning of a term (Respondent's Brief, p. 16). The affidavit was filed August 27, 1959, more than ten days before the beginning of the term. Obviously, as the affidavit was filed within the time specified by the statute, it was unnecessary to show "good cause" for filing it late.

In support of its position, respondent cites only *Lipscomb* v. *United States*, 33 F. 2d 33, 34 (8 Cir. 1929) "and cases cited." Neither the *Lipscomb* case, nor either of the two cases cited therein is remotely in point. In *Lipscomb* the affidavit was filed five days before the trial. In *Bishop* v. *United States*, 16 F. 2d 410, 411 (8 Cir. 1926) and *Rossi* v. *United States*, 16 F. 2d 712, 716 (8 Cir. 1926), the two cases cited in *Lipscomb*, the affidavit was filed on the day of the trial.

Significantly, while indirectly citing *Bishop* v. *United States*, *supra*, the government overlooks the following language at page 411:

> "We think the expression of the court in *Chatin* v. *United States* (4th Circuit) 5 F. (2d) 592, 595, clearly states the reasonable construction of the statute: 'The fair and reasonable construction of the statute is that, when the indictment is found ten days or more before the term begins at which the case is to be called for trial, the affidavit must be filed 10 days before the beginning of the term, or good cause shown for the delay; when the indictment is found less than 10 days before such term begins, the affidavit must be filed as soon as practicable before the term begins.

> or good cause shown for the delay; when the indictment is found after the term has begun, the affidavit must be filed as soon as the disqualifying facts are known, or good cause shown for delay.'"

In the case at bar, the indictment was found (R. 1) more than ten days before September 8, 1959, the beginning of the term at which the case was called for trial, and the affidavit was filed on August 27, 1959, also more than ten days before the beginning of that term, thus fully complying with the rule of the *Bishop* and *Chan* cases.

III. There was no "ratification" by petitioner of the plea of guilty.

Respondent stresses the fact that thirty days elapsed after the plea before petitioner made any formal claim that the plea was the result of coercion, and did not seek to change his plea until sentence had been passed. Therefore, the government argues, there was a "ratification" of the plea. (Respondent's Brief, 38). Such a point would be well taken if the plea had been procured by a more classical type of coercion, *e.g.* a beating, which, once inflicted, is over and done. But respondent's reasoning is not applicable where the coercion is continuous. Petitioner's disease is a heart condition, which respondent admits is progressive (Respondent's Brief, page 31, footnote 31), and the threat of injury or death as the result of a trial was continuous and was just as real throughout those thirty days and on the day of sentencing as it had been on the day the plea was taken. Petitioner still had the same sword hanging over him until the case was finally disposed of.

IV. Respondent's brief exceeds and misconstrues the record in the following particulars:

A. At page 14, the government interprets the defendant's allegation that Judge Hoffman has in other cases exhibited a personal bias for the government and against the defendant as no more than an assertion that Judge Hoffman has a reputation as a "hard" judge. This interpretation is patently erroneous. The assertion of the defendant was made with particular and express reliance upon *United States* v. *Carmel*, 267 F. 3d 345, wherein the actions of Judge Hoffman were determined by the United States Court of Appeals for the Seventh Circuit to have destroyed *the atmosphere of impartiality*. The behavior of the trial judge in the courtroom during the *Carmel* case is an inescapable part of the setting within which the defendant inferred bias from the *ex parte* conference with government counsel and the principal government witness in his own case.

B. At page 21, the government interprets the allegation that "things and matters relating to the quantum nature and theory of the government's proof in this cause were discussed" as consistent with a nonprejudicial conference as with a prejudicial one. In support of this argument the government submits that the judge could not have comprehended so complicated a case as that presented here in a short time and have formed an opinion thereon. The argument lacks merit, for nothing is so well known as the danger of a little knowledge. It also suggests that government counsel was obviously concerned with whether the judge had any intention of bringing the case to trial on short notice. The want of merit in this suggestion is the equally obvious concern of *defense counsel* about any such intention of the judge. The government further suggests that defense counsel chose to foreclose clarification as to what occurred at the conference. The want of merit in that suggestion is that

defense counsel recognized that he is not entitled to know. No hearing could be had on the affidavit. It was not insistence of defense counsel that required the affidavit to be treated solely as one of sufficiency on its face (see government brief, pp. 19-20). It was insistence of the statute that so required. There was no manner in which this information could have been given, save by the voluntary action of those persons who attended the conference. No such action was taken.

C. At page 11 of its brief the government argues it was initially reported that "the collapse was caused by a heart attack but by the following day it was learned that that was not the reason. Because of defense counsel's objection that disclosure of the true reason for the collapse would be slanderous, however, the actual cause of the collapse is not disclosed by the record." Later, the government argues that the cause of the collapse was not a heart attack. We respectfully submit that the government cannot state with certainty or upon appropriate evidence the cause of the collapse. We further respectfully submit that "disclosure of the true reason for the collapse," as the government elects to designate it, was not foreclosed by defense counsel's objection, but by recognition of the trial court that the offer of information by the United States Attorney did not constitute competent evidence.*

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* Mr. Purcell: . . . Throughout this motion there is reference to cardiac disturbance.

"The Court: Yes. Let me have that, then. **I will permit you to read that.** Is that a report from the attending physician?

"Mr. Purcell: No, your honor.

"Mr. Barnett: No, sir, it is a notation of the marshal's conversation with Dr. Jack.

"The Court: I am not called at this moment to pass upon that. I am called to rule upon this motion." (App. 232-233)

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted.

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